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NO. 58932-6-1

IN THE COURT APPEALS
OF THE STATE OF WASHINGTON DIVISION 1

THE ESTATE OF PAMELA L. KISSINGER,

Respondent,

v.

JOSHUA HOGE,

Appellant.

BRIEF OF APPELLANT

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NO. 2 The trial court erred in entering Finding of Fact 4 in the Order of September 11, 2006 that found the Joshua Hoge intentionally, knowingly and willfully killed a human being.

NO. 3 : The trial court erred in entering Finding of Fact 6 in its Order of September 11, 2006 that found that Hoge subjectively knew he was killing a human being when he stabbed Pamela Kissinger, and that he did so with premeditated intent.

NO. 4 The trial court erred in adopting Conclusion of Law 1 in its Order of September 11, 2006 that concluded that Hoge killed Pamela Kissinger willfully.

NO. 5 The trial court erred in adopting Conclusion of Law 2 in its Order of September 11, 2006 that concluded that the killing of Pamela Kissinger was unlawful.

NO. 6 The trial court erred in adopting Conclusion of Law 3 in its Order of September 11, 2006 that concluded that the insanity of Hoge did not negate the mens rea to make that killing unlawful.

NO. 7 The trial court erred in adopting Conclusion of Law 4 in its Order of September 11, 2006 that concluded that Joshua Hoge willfully and unlawfully killed Pamela Kissinger and was a slayer within the meaning of RCW 11.84.010(1).

ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

NO. 1 Whether the trial court erred in finding and concluding that, although Joshua Hoge was found not guilty by reason of insanity of the killing of his mother Pamela Kisssinger, that he acted wilfully ? (Assignments of Error 1, 2,3,4, 7)

NO. 2 Whether the trial court erred in finding and concluding that, although Joshua Hoge was found not guilty by reason of insanity of the killing of his mother Pamela Kisssinger, that he acted unlawfully? (Assignments of Error 1, 5, 6, 7)

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II. STATEMENT OF THE CASE

Joshua Hoge was found not guilty by reason of insanity for the killing of his mother. Mr. Hoge has a lengthy history of serious mental illness. He has been diagnosed with chronic schizophrenia, paranoid type. He was first diagnosed with schizophrenia as a teenager. His first mental health hospitalization was in 1992, and he has been hospitalized many times since then. He has been hospitalized several times at both Harborview and Western State Hospital. His symptoms over the years have remained consistent. He has hallucinations, hears voices and has lived under the dominating influence of his delusions. His delusions over the years have included the longstanding beliefs, among others, that his mother and brother were imposters, that he has a daughter (he has no children), that he has an ability to perform magic, that spaceships have been involved with his life, and beliefs about the ability to travel through time. As Dr. Leong, the State appointed expert in the murder case, points out in his report, even with substantial doses of antipsychotic medication, Mr. Hoge had remained delusional. CP 142

Mr. Hoge has also been diagnosed with Capgras syndrome. This is a psychotic illness in which a person believes certain people in his life are

actually imposters. Usually that person is a relative, as it was with Mr. Hoge. For some time, including the time of the killing, Mr. Hoge believed that his mother was not in fact his mother but actually an imposter taking his mother's place. As early as 1994, during Mr. Hoge's second admission to Western State Hospital, he presented with this misidentification of his mother, along with other paranoid thinking and psychotic symptoms. In 1995, Mr. Hoge had an intake evaluation with Northwest Mental Health Services. At that time, he was noted to have a history of hallucinations and the delusion that his mother was not his mother. As Dr. Leong described Capgras syndrome on page 25 of his 30-page evaluation, he wrote:

> Paranoid themes dominate Mr. Hoge's delusions. He has a longstanding misidentification of delusion of his mother, also known as a Capgras delusion. In the Capgras delusion, the affected individual believes that a real individual has been replaced by a physically identical...individual. This delusionally held Capgras object is viewed as an imposter or double....While there are both psychodynamic and neuropsychiatric explanations for the Capgras delusion, the end result is that the delusional individual views the Capgras object with a combination of hostility and fear....Mr. Hoge's clinical representation is consistent with that of a rather typical case of the delusional misidentification of the Capgras type. CP 142-143

Mr. Hoge's statements around the time of his arrest for his mother's killing show the extent of his delusions. His statements, reported in Dr. Leong's evaluation, include: "They killed my child, they killed my baby, I had to do it." (He has no child.) "They used a magic spaceship..." "I stabbed him with the knife...he must be magic." When asked about searching for this missing child, he responded "She is probably sold you know...to outer space." "I made two people die...They were not my family and they were spending my mom's money." Again, about his "child", he said "It doesn't matter. They come and gather everything and use time machines." "I got in a fight with people that looked like my family...2 died somehow one didn't...Did I die? I wanna know if I died... brain aroma" and then said something about dying from brain magic. He asked the deputy if he could get him or make him a spaceship. This is just a sampling of some of Mr. Hoge's statements in the hours following the deaths. CP 116-118

Mr. Hoge was criminally charged with the killings of his mother and brother. In that criminal matter, both the state and the defense experts were in agreement that Mr. Hoge was legally insane at the time of the killings. Both diagnosed Mr. Hoge with Schizophrenia and Capgras syndrome. The motion for an acquittal by reason of insanity was a joint motion by both the

state and the defense. The Superior Court, in finding him not guilty by reason of insanity, specifically made findings that Mr. Hoge at the time of the murders suffered from both Capgras Syndrome and Schizophrenia. Although only one of the following findings was legally required, the Court found both that:

> (10) As a result of the **proportion and magnitude of his mental disease** or defect, the defendant's mind was affected to such an extent that **he was unable to appreciate the nature and quality of his acts** on June 23, 1999 when he killed Pamela and James Kissinger and attacked Walter Williams.
>
> (11) As a result of the **proportion and magnitude of his mental disease** or defect, the **defendant's mind was affected to such an extent that he was unable to know right from wrong** on June 23, 1999 when he killed Pamela and James Kissinger and attacked Walter Williams. [Emphasis added] CP 143-144

Indeed, the estate of Mr. Hoge's mother filed a lawsuit claiming a mental health agency was in fact liable for her death for not treating the obvious signs of Mr. Hoge's most serious mental illness. That estate is now claiming that Mr. Hoge is legally responsible for what he did. CP 145

III. ARGUMENT

A. JOSHUA HOGE IS NOT A SLAYER WITHIN THE MEANING OF RCW 11.84.020 BECAUSE THE KILLING OF HIS MOTHER WAS NOT WILFUL OR UNLAWFUL.

1. THE BURDEN IS ON THE ESTATE TO PROVE UNDER CH. 11.84 RCW THAT MR. HOGE'S KILLING OF HIS MOTHER WAS BOTH WILFUL AND UNLAWFUL.

The Court in *Cook v. Gisler*, 20 Wn. App. 677, 582 P.2d 550 (1978) said at p. 683:

> We hold that when the slayer statute, RCW 11.84, is asserted to defeat the claim of one who otherwise would be entitled to inherit, the burden of proof is upon the party seeking the benefit of the statute to prove that the killing was willful and also that it was unlawful.

As we come before this Court, Joshua Hoge is a beneficiary of his mother's estate. The estate in this case have not met its burden overriding that presumption.

2. THE INSANITY DEFENSE IN WASHINGTON IS ONLY ALLOWED FOR THE MOST EGREGIOUS CASES IN WHICH THE DEFENDANT IS SO OUT OF TOUCH WITH REALITY THAT HE IS

BEYOND THE INFLUENCES OF CRIMINAL LAW.

A long line of cases explain that the test for insanity in Washington was meant to be and is quite restrictive, and intended to apply to only the most severely mentally ill who have lost all contact with reality. The Court in *State v. Crenshaw*, 98 Wn. 2d 789, 659 P.2d 488 (1983), said at p. 793:

> The insanity defense is not available to all who are mentally deficient or deranged; legal insanity has a different meaning and a different purpose than the concept of medical insanity. A verdict of not guilty by reason of insanity completely absolves a defendant of any criminal responsibility. Therefore, 'the defense is available **only to those persons who have lost contact with reality so completely that they are beyond any of the influences of the criminal law**.' And at p.796-797:
> Such an interpretation is consistent with Washington's strict application of M'Naghten. This court's view has been that 'when M'Naghten is used, all who might possibly be deterred from the commission of criminal acts are included within the sanctions of the criminal law. *State v. White*, 60 Wn. 2d 551, 592, 374 P.2d 942 (1962). At 801:
> Many, if not most, mentally ill persons presently being treated in the mental institutions of this state who are there under the test of likelihood of serious harm to the person detained or to others,...would not meet

the M'Naghten test, if charged with a crime.

The Court in *State v. White*, 60 Wn. 2d 551, 374 P.2d 942 (1962), extensively cited in *Crenshaw*, described further that the insanity defense is for those who have committed the crime through no fault of their own, at p. 591-592:

> The theory of the exception [the insanity defense] is that it is futile thus to threaten and condemn persons **who through no fault of their own** are wholly beyond the range of influence of threatened sanctions of this kind.
> ...
> The M'Naghten rule declares that **one who is so far removed from reality that he does not know the nature of his act does not have the mentality to be adjudged responsible**. Such a holding is inevitable because of the requirement of mens rea. [Emphasis added]

3. JOSHUA HOGE IS NOT A SLAYER UNDER RCW 11.84.020 BECAUSE THE CIRCUMSTANCES OF THE KILLING SHOW HE DID NOT ACT WILFULLY.

A person who is found not guilty by reason of insanity is not a slayer within the meaning of RCW 11.84.020. That statute says: "No slayer shall in any way acquire any property or receive any benefit as the

result of the death of the decedent, but shall pass as provided in the sections following." Then RCW 11.84.010 defines "slayer". It says:

> As used in this chapter:
> (1) "Slayer" shall mean any person who participates, either as a principal or an accessory before the fact, in the **wilful** and **unlawful** killing of any other person.
> [Emphasis added]

One issue before this Court is whether Joshua Hoge's killing of his mother was "wilful". No Washington case has decided this issue in the context of someone found not guilty by reason of insanity. This situation would come up very rarely as attested by the fact that there are no cases on point.

A person cannot be said to be acting wilfully if one is so far removed from reality that he does not know the nature of his actions and thus cannot be held criminally responsible. The very nature of willfulness implies a certain appreciation of the nature of one's actions and a certain ability to control one's actions. Joshua Hoge was not acting wilfully when he killed his mother.

In Washington only the most extreme cases meet the test for insanity. One must have totally lost contact with reality. One cannot be said to have acted wilfully with respect to an act when they have lost

contact with reality. Mr. Hoge's case in particular is not a close case. The motion for the insanity acquittal was a joint motion by both the defense and the state. The court made findings that Mr. Hoge could neither perceive the nature and quality of his act, nor tell the difference between right and wrong with respect to his actions. Further, Mr. Hoge suffered from Capgras syndrome. He did not believe the person he was killing was his mother. To be afflicted with schizophrenia is a living hell. To say that this person acted wilfully does not comport with his acquittal and the findings of the Superior Court. To say that he acted wilfully would be to eviscerate the word wilful of meaning. How can one act wilfully when he is unable to appreciate the nature and quality of his acts?

Immediately after the killings Joshua Hoge asked the emergency room nurse if he [Joshua] had died. He did not believe his mother was his mother but some imposter who was stealing her money. He made statements to the effect that he killed to save his daughter and he has no daughter. Then he said that his daughter was probably sold to outer space. He made references to spaceships, time machines and magic. He was clearly psychotic and as found by the superior court he could not perceive the nature and quality of his acts nor did he know right from wrong with

respect to his actions.

Interestingly, this money is at issue because Mr. Hoge was so seriously mentally ill at the time of the killings and was not treated properly for his illness. The lawsuit resulting in the settlement of money at issue here laid the blame at the agencies who should have been supervising Mr. Hoge, not Mr. Hoge. It is also important to note, as the Court did in *White*, supra, that mental illness is absolutely not the fault of the person afflicted. Mr. Hoge was not in the situation, probably anticipated by the statute, of killing in order to benefit.

a. The Supreme Court of Washington has defined wilfully for purposes of RCW 11.84.010 as intentionally and designedly.

The Supreme Court of Washington in *New York Life Insurance Company v. Jones*, 86 Wn. 2d 44, 541 P.2d 989 (1975), took the issue of wilfullness with respect to the slayer's statute quite seriously. In that case, a woman pleaded guilty to second degree murder for the killing of her husband. The question before the court was whether the slayer's statute precluded the woman from being a beneficiary to the proceeds of a life insurance policy, that is, whether the killing was done willfully. The

Supreme Court defined willfully for purposes of the slayer's statute. It said at p. 47:

> Words of a statute not particularly defined are to be given their ordinary, everyday meaning. If the legislature uses a term well known to the common law, it is presumed that the legislature intended it to mean what it was understood to mean at common law...
>
> **Willfully means intentionally and designedly**. State v. Russell, 73 Wn.2d 903, 442 P.2d 988 (1968); State v. Spino, 61 Wn.2d 246, 377 P.2d 868 (1963); *Webster's Third New International Dictionary* 2617 (1968). *See* 45 *Words & Phrases* 313-28 (perm. ed. 1970). The authorities collected there show that this meaning attaches to the word, whether it is used in civil or criminal statutes.
> [Emphasis added]

In interpreting this statute, the *Jones* Court said that even someone convicted of murder in the second degree could possibly be allowed to inherit under Washington's slayer's statute, that it depended on the facts of the case. In that case, the wife was charge with second degree felony murder with assault as the underlying felony. The court said:

> Assault in the second degree is defined in RCW 9.11.020. The provisions of this statute require at most proof of an intent to injure or to inflict great bodily harm. Neither second-degree assault nor second-degree felony murder requires proof of an intent to kill. We

> so held in *State v. Harris*, 69 Wn.2d 928, 421 P.2d 662 (1966) Since a charge of second-degree felony murder (assault in the second degree) can be sustained without proof that the killing was intentionally done, it follows that a plea of guilty to such a charge does not admit that the killing was willful. Thus, the secondary beneficiaries are not entitled to a summary judgment upon a bare showing that the primary beneficiary pleaded guilty to such a charge.

If someone convicted of second degree murder might not be a slayer for purposes of the slayer statute, then certainly someone found not guilty by reason of insanity is definitely not a slayer.

The definition of "wilful" in this civil statute is not limited to the criminal context but should be designated its ordinary meaning. Though there was a whole body of criminal law cases at the time that the Washington Supreme Court in *Jones* decided the meaning of wilful, the court did not look to it. Further, the slayer's statute was enacted prior to RCW 9A.08.010 which defines various mental states for purposes of criminal law. It does not make sense then that RCW 9A.08.010 should be the determining factor in the meaning of willful for purposes of the slayer's statute.

The respondent seems to rely on *State v. Box,* 109 Wn.2d 320, 745

P.2d 23 (1987) to support its position regarding Mr. Hoge's actions as being willful. However, it is important to note that the issue and holding in *Box* was that the defendant has the burden of proving sanity/insanity in a criminal proceeding.

The *Jones* Court's definition is consistent with other authorities. "Wilful" has been defined by the Second College Edition of the American Heritage Dictionary as: "Being in accordance with one's will; deliberate." Then "deliberate is defined as: "1. a. Considered or planned in advance with **a full awareness of everything involved**; premeditated. b. Done or said on purpose**; intentional. 2. Careful and thorough in deciding or determining.**" This definition has been echoed in Washington case law. In *Kremer v. Audette*, Wn. App. 643, 668 P.2d 1315 (1983), the court held that for a plaintiff to recover under wilful misconduct, he must prove an "intentional injury." Or in *State v. Bauer*, 92 Wn.2d 162, 595 P.2d 544, the court said when discussing the meaning to ascribe to wilful nonsupport: "...the trial court in this case defined the term "wilfully" as "intentionally, deliberately and/or designedly"...and that that definition was not "inconsistent with the definition we have set out." at p. 169. As indicated by the circumstances surrounding the killings and Mr. Hoge's

statements, he could not deliberate, he had no awareness of the reality of the situation. He was completely out of touch with reality.

Mr. Hoge was found not guilty by reason of insanity of murder in the first degree. Washington State has adopted the M'Naghten rule as the test for insanity. That test was codified in RCW 9A.12.010 as:

> To establish the defense of insanity, it must be shown that:
> (1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:
> (a) He was unable to perceive the nature and quality of the act with which he is charged; or
> (b) He was unable to tell right from wrong with reference to the particular act charged.

Although a person need meet only one of those prongs for a finding of insanity, Mr. Hoge was found not guilty under both prongs of the insanity statute. It was not a close case. A person who is unable to perceive the nature and quality of his actions because of a mental disease certainly cannot be said to act wilfully with respect to those actions .It would be inherently contradictory. Likewise, one who is unable to tell right from wrong with regard to an act cannot be said to be acting wilfully. A person like Mr. Hoge, who because of longstanding schizophrenia, was unable to perceive both the nature and quality of his actions and unable to

tell right from wrong could never be said to be acting wilfully with regard to those actions. Mr. Hoge's case is further complicated by the fact that he suffered from Capgras syndrome. Mr. Hoge did not believe his mother was his mother. Under that set of facts alone, Mr. Hoge cannot be said to have wilfully killed his mother when he did not even believe he was killing his mother. It seems evident that Mr. Hoge did not act intentionally, designedly or with a full (or even partial) awareness of what was actually happening.

4. JOSHUA HOGE'S KILLING OF HIS MOTHER WAS NOT UNLAWFUL. HE WAS ACQUITTED BY REASON OF INSANITY.

Insanity is a defense to the crime of murder. RCW 9A.12.010 defines what a defendant needs to show to establish the defense. RCW 10.77.030(2) also prescribes that insanity is a defense. RCW 10.77.080 dictates that the defendant may move for a judgment of acquittal. Joshua Hoge was acquitted of the crimes of which he was charged. If a person is acquitted, found not guilty, his actions cannot be said to be unlawful.

The case law further substantiates this position and describes the policy reasons behind it. The Court in *State v. Crenshaw*, 98 Wn. 2d 789,

659 P.2d 488 (1983), said at p. 793:

> The insanity defense is not available to all who are mentally deficient or deranged; legal insanity has a different meaning and a different purpose than the concept of medical insanity. A verdict of not guilty by reason of insanity **completely absolves a defendant of any criminal responsibility.** [Emphasis added]

In *White*, supra, at p.592

> The M'Naghten rule declares that one who is so far removed from reality that he does not know the nature of his act does not have the mentality to be adjudged responsible.

In *State v. Hutsell*, 120 Wn.2d 913, 845 P.2d 1325 (1993), the court cited *Crenshaw* at p. 920 for the proposition that "insanity acts as a complete defense and therefore requires a rigorous test."

Joshua Hoge was found not guilty by reason of insanity; he was acquitted. That is a complete defense to the charge.

It's true that the criminal statutes refer to excusable and justifiable homicide, but there is no specific reference to lawful and unlawful. Any person acquitted of a crime for whatever reason cannot be said to have acted unlawfully. A jury need not decide if a murder was excusable or justifiable, but may just decide the person is not guilty.

Other jurisdictions that have decided this issue of whether a person

who is found not guilty by reason of insanity has acted unlawfully have generally come to the same result. In *In Estates of Ladd*, 91 Cal.App. 3d 219, 153 Cal. Rptr. 888 (1979), the court said at p.226:

> Section 258 [California's slayer's statute] refers to a person who has 'unlawfully and intentionally' caused the death of a decedent. Insane persons are not capable of committing crimes...Insane persons therefore are not capable of acting 'unlawfully' for purposes of section 258.

See also the cases cited in the next section, many of which relied on the unlawfulness prong to find that insanity acquittees do not fall within the ambit of the slayer's statute.

5. OTHER JURISDICTIONS THAT HAVE DECIDED THIS ISSUE HAVE OVERWHELMINGLY DECIDED THAT A PERSON ACQUITTED BY REASON OF INSANITY IS NOT A SLAYER WITHIN THE MEANING OF THE SLAYER'S STATUTE.

Other jurisdictions have overwhelmingly decided that if a person is insane at the time of the slaying then the slaying is not wilful or unlawful and the slayer statute does not apply. Nearly every case cited by the plaintiff supports Mr. Hoge's position that the slayer's statute does not apply when a person is found not guilty by reason of insanity.

In an extremely thorough analysis, the court in *Ford v. Ford*, 307 Md. 105, 512 A.2d 389 (1986) held that the slayer's rule dictated that a killer who was insane at the time of the murder could inherit under the will of her victim. It said at p. 398:

> The terms of that definition [insanity] simply make the maxims prompting the rule—no one shall be permitted to profit by his own fraud, to take advantage of his own iniquity, or to acquire property by his own crime—inappropriate when a person is criminally insane. **A person who suffers a mental disorder or is mentally retarded and falls under the cognitive and volitive components of the criminal responsibility statute does not, by the very terms of those components, act with an unfettered will. His conduct is controlled and his will is dominated by his mental impairment.** [Emphasis added]

That court said at p. 399 that at the time of its opinion:

> The result we have reached is in complete accord with the decisions of our sister states which have addressed the problem. Forty-three other states have adopted by legislative enactment a slayer's rule comparable in effect to our rule, and several have embraced such a rule through its case law. See Appendix A. We find that the courts in only 16 of those states, however, have construed the rule, in rendering a decision by way of orbiter dictum, in light of the killer's insanity. See Appendix

> B. **But each and every one of those courts have reached the same result—the slayer's rule does not operate to bar a killer who, at the time of the commission of the homicide, was insane**....The common thread running through all the cases is that permitting the insane killer to share in the distribution of his victim's assets is consistent with the common law principle of equity which prompted the adoption of the slayer's rule in the first place.
>
> [Emphasis added]

The Court in *Sobel v. The National Bank and Trust Company of Erie*, 71 Pa. D. & C.321 (1950) held the Slayer Act did not apply to a wife who killed her husband and was found not guilty by reason of insanity. The wife suffered from schizophrenia and could not be said to have wilfully killed her husband as her act involved no degree of conscious wrong. In that case, the term slayer is defined exactly the same as in Washington: "...any person who participates, either as a principal or as an accessory before the fact, in the wilful and unlawful killing of any other person." The court in that case discussed in detail the meaning to be attributed to the word "wilful". It said at p. 324-325:

> But in a broad sense every voluntary act of a human being can be said to be intentional and therefore "willful". Is this the interpretation of the word which must be applied in cases of the character involved here? **Is the mere commission**

of a voluntary act resulting in death to another to be construed as a willful killing where the volition originates in a diseased mind? Blackstone formulated a general answer to these questions when he said (book 4, ch. II, par. 21):

"Where there is no discernment there is no choice, and where there is no choice there can be no act of the will...: he, therefore, that has no understanding can have no will to guide his conduct."

It is proper for the text writers to generalize in this fashion, but courts must be slow to decide particular issues upon such foundation. It would be easy to accept, as universally applicable, the pronouncements made by eminent text authorities in point for they seem to be unanimous in holding that the insanity of a beneficiary who kills the insured removes any bar denying such beneficiary the proceeds of the insurance. Appleman, Insurance Law and Practice, volume 1, part 3, § 384, states:

"Clearly, where the beneficiary was insane at the time of the homicide, there is no moral turpitude involved either in the act itself or in the recovery of the policy proceeds...."

Finally it said at p. 328 that in the wife's case:

"Her act involved **no degree of conscious wrong. It was so much the act of her disease and so little her own deed** that it might well have been committed by a third person...the term 'wrong' clearly means something more than a mere undesigned tort. It implies a willful wrong in the sense of an iniquitous, designing deed."

Similarly, Josh Hoge's act was so much the act of his disease and not in any meaningful sense a conscious wrong. Although that court said that each case must be looked at individually, it did note that:

> It would be easy to accept, as universally applicable, the pronouncements made by eminent text authorities in point **for they seem to be unanimous in holding that the insanity of a beneficiary who kills the insured removes any bar denying such beneficiary the proceeds** of the insurance. At p. 324. [Emphasis added]

In finding that the slayer's statute did not apply in the case of criminal insanity, the court in *Turner v. Estate of Turner*, 454 N.E.2d 1247 (1983) also noted that the trend across the nation was that the killer in a case of not guilty by reason of insanity did not fall within the ambit of the slayer's statute. In *Turner*, the court held that "legally [Allen] committed no wrong, not knowing at the time the nature and quality of [his] act." At p. 1252.

In finding that the slayer's statute did not apply in the case of criminal insanity, the court in *In re Estate of Vadlamudi*, 183 N.J. Super. 342, 443 A.2d 1113 (1982) found an insane slayer was allowed to inherit from her husband's estate. New Jersey has also adopted the M'Naghten test for determining insanity. The New Jersey court held that as a matter of law one

found not guilty by reason of insanity of murder could not be said to have perpetrated the act intentionally. The statute in New Jersey required showing the act was intentional, thus, the killer could not be denied a share of the victim's estate.

In finding that the slayer's statute did not apply in the case of criminal insanity, in *In re Eckardt's Estate*, 184 Misc. 748, 755, 54 N.Y.S.2d 484 (1945), the New York court held that a woman who was insane at the time of the murder could inherit because "legally the wife committed no wrong, not knowing at the time the nature and quality of her act."

In finding that the slayer's statute did not apply in the case of criminal insanity, in *In Estates of Ladd*, 91 Cal.App. 3d 219, 153 Cal. Rptr. 888 (1979) the court held that a mother found not guilty by reason of insanity for the killings of her sons could not be denied her share of the proceeds from their estates. The court looked at the statutory provision which prohibited a killer from inheriting from the victim, and that it did so only when the killing was "unlawfully and intentionally" perpetrated. The court held that the mother's insanity rendered her incapable as a matter of law of killing her sons in an unlawful and intentional manner.

Minnesota has also held that an insane killer could not be denied his

share of the victim's estate. In *Anderson v. Grasberg*, 247 Minn. 538, 78 N.W.2d 450 (1956) the husband was found insane and therefore incapable of standing trial for the murder of his wife. The court held the husband's insanity prevented the killing from being an intentional act and thus he could not be precluded from succeeding to the couple's jointly held property. That court reasoned as follows:

> Insanity has been recognized in all civil countries as a defense against punishment for crime, and this has been so because, if the perpetrator is so mentally diseased that he does not have the intent or animus in the commission of the crime, the act lacks the elements which constitute the crime the law seeks to punish. These general principles would seem to apply with equal vigor in determining whether the survivor has committed a legal wrong in killing his joint tenant, **for if his mind was so diseased that it was the disease and not his own will which caused the act to be committed**, it cannot be fairly said that he has committed a wrong for which the law should upset the customary legal rights of property ownership. At 546-7. [Emphasis added]

The Florida Supreme Court has likewise held that a wife could not be denied her dower interest when she had killed her husband but was found not guilty by reason of insanity for his murder.

In *Hill v. Morris*, 85 So. 2d 847 (1956) the court again found that as

a matter of law the not guilty by reason of insanity finding precluded a showing that she had the capacity to commit the crime.

The Texas appellate court held in *Simon v. Dibble*, 380 S.W.2d 898 (1964) that a husband should be allowed to receive life insurance proceeds from a policy covering his wife following his acquittal for her murder on grounds of insanity.

The United States Sixth Circuit Court of Appeals in *Shoemaker v. Shoemaker*, 263 F.2d 931 (1959) quoted the Restatement of Restitution and said the general rule was :

> It is admitted that the insured died 'as a result of gunshot wounds inflicted by his wife.' Although the National Service Life Insurance Act of 1940, as amended makes no provision for the situation where the designated beneficiary kills the insured, public policy founded upon the equitable principle that no person should be permitted to profit from his own wrong intervenes to prevent such a beneficiary from taking the proceeds of the insurance, **unless the beneficiary was insane at the time**, or the killing was accidental, or was committed in self-defense. See Restatement, Restitution Sections 187, 189 (1937). [Emphasis added]

IV. CONCLUSION

It is beyond dispute that schizophrenia is a disease of the mind over which a person has no control. The life of a person with chronic schizophrenia is a living hell. To be found not guilty by reason of insanity a person must have lost all touch with reality. Mr. Hoge's tragic killing of his mother was so much the act of his disease and not his volition. Joshua Hoge killed his mother but was unable to appreciate the nature and quality of his acts and unable to know right from wrong. Mr. Hoge acted neither unlawfully or wilfully. The plaintiffs have not met their burden. Joshua Hoge is a beneficiary of his mother's estate.

Respectfully submitted this 2 day of March, 2007

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IN THE COURT APPEALS OF THE STATE OF WASHINGTON
DIVISION I

IN RE THE ESTATE OF:	NO. 58932-6-I
	PROOF OF SERVICE
PAMELA L. KISSINGER, Deceased.	

PROOF OF SERVICE

I, Jean O'Loughlin, a person over 18 years of age, served Mark Leemon, at 2505 2nd Avenue, Ste., 610, Seattle, WA a true copy of the Brief of Appellant on the 2nd day of March, 2007.

I certify under penalty of penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of March, 2007, at Seattle, WA.

Jean O'Loughlin

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